

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK**

DANIEL SMIGIEL,

Case No. 21-CV-06323(MKB)(RML)

Plaintiff,

v.

COLLEGE OF STATEN ISLAND
DR. FRANCES MELENDEZ,
And DR. LAUREN ROGERS-SIRIN,
Defendants.

**PLAINTIFF'S REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFF'S
MOTION FOR LEAVE TO AMEND THE COMPLAINT**

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Plaintiff, Daniel Smigiel, by and through his attorney, The Law Office of Keith Altman, respectfully submit this Reply Brief and hereby state the following:

BACKGROUND

Plaintiff initiated the current lawsuit on November 15, 2021. Defendants filed a Motion to Dismiss which was ultimately granted on February 21, 2023, in its entirety. The Court noted that Plaintiff's state law claims were dismissed without prejudice. The Court did not designate whether Plaintiff's federal law claims were dismissed with or without prejudice. Plaintiff brings the present Motion to Amend the Complaint.

ARGUMENT

Under Rule 15(a)(2), "[t]he court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2).

Where it was possible that plaintiff could prove set of facts to support his claim, District Court should have granted plaintiff leave to amend to provide greater specificity, even though no formal motion to amend was filed, since it was clear that plaintiff desired to do so. *Oliver Sch. v. Foley*, 930 F.2d 248, 19 Fed. R. Serv. 3d (Callaghan) 683, 1991 U.S. App. LEXIS 6021 (2d Cir. 1991).

This honorable court provided that Plaintiff's state law claims were dismissed without prejudice. Further, Plaintiff's federal law claims were dismissed without designation as to whether the claims were dismissed with prejudice or without prejudice. As such, Plaintiff's claims should be construed as to have been dismissed without prejudice allowing the present motion for leave to amend to be considered by the court.

A court should not consider merits of claim or defense on motion to amend, unless it is clearly frivolous or legally insufficient on its face. *Northbrook Nat'l Ins. Co. v. J & R Vending Corp.*, 167 F.R.D. 643, 1996 U.S. Dist. LEXIS 15585 (E.D.N.Y. 1996). Plaintiff's claims are brought in good faith and without undue delay.

CONCLUSION

Plaintiff's Motion for Leave should be granted. Defendants would not suffer prejudice to their defense of the case. The Court should therefore grant leave to amend the Complaint and to file the proposed Amended Complaint.

Dated: April 28, 2023

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I certify that on April 28, 2023, I served the foregoing document upon all parties herein by filing copies of same using the ECF System.

/s/ Keith Altman

Keith Altman, Esq.